Collective Agreement had been taken cognizance of by the Industrial Court, the said court, which had not taken cognizance of the Interim Agreement, could not deal with any reference concerning the Interim Agreement as an interpretation issue under section 33 of the said Act. In any case, it was clear that this was a reference of a trade dispute to the Industrial Court under section 26 and was not a reference of a question of interpretation under section 33 of the said Act. The powers of an Industrial Court of making awards are provided for in section 30 of the said Act and under the said sub-section (7) of section 30 of the Act, a retrospective date of any award made may not be earlier than six months from the date on which the dispute was referred to the Industrial Court. As will be seen in the said proviso to the said sub-section (7) of section 30, the exceptions provided for relate to cases of a decision of the said court under section 33 or an order of the said court under section 56(2)(c) or a decision of the said court on a reference to it under section 20(3). The present case was not one of those exceptions provided for. There was therefore an error of law on the face of the Record justifying the High Court in making an order of *certiorari* on that ground alone.

As the proceedings before the Industrial Court on July 22, 1976 were wholly unsatisfactory, and for the reasons above, I therefore allowed the application and ordered that Award No. 57/76 of the Industrial Court be removed to the High Court and be quashed accordingly. I also ordered that the costs of and incidental to the application be paid by the respondent.

Application allowed.

Solicitors: *Allen & Gledhill; John R. Gurusamy & Gengadharan.*

K.P. KUNCHI RAMAN v. GOH BROTHERS SDN. BHD.

[O.C.J. (Gunn Chit Tuan J.) March 29, 1977]
[Penang — Civil Suit No. 234 of 1972]

Contract — Entire contract — Doctrine of substantial performance — Rights of parties.

The plaintiff, a contractor, originally claimed that a sum of $16,580.18 which was reduced to $11,656.81, was due to him being the balance payable for work performed under an agreement dated November 17, 1970. By that agreement the plaintiff agreed to execute certain works, namely, to lay water pipes complete with specials and valves between Mak Mandin and Prai and between Mak Mandin and Jalan Raja Uda in Butterworth. Under the agreement, the defendant undertook to supply the pipes, etc. at the site of work, whereas the plaintiff was to supply all labour and other equipment for laying the pipes. The contract also included work for the reinstatement of a cycle tract of a size and length and at rates detailed in the said agreement. The plaintiff claimed that he had performed the work of reinstatement of the cycle track by July 15, 1971 and the other works by September 15, 1971. The defendant, a company, denied that the plaintiff had completed the works in question as claimed by him, and averred that it was a term of the contract that the plaintiff would execute the works to the satisfaction of the defendant and the Chief Resident Engineer of the River Muda Water Scheme, who was in charge of the contract works, but in spite of repeated requests by the defendant to comply with the instructions, the plaintiff failed to complete the works as agreed. The defendant incurred expenses in completing the contract and counterclaimed for repayment of sums paid to the plaintiff or for damages.

Held: as the plaintiff had substantially completed the contract he was entitled to claim for any balance due to him for work done. The defendant was also entitled to cross-claim for the defects and omissions, and as the cost of completing the contract work and repairing work unsatisfactorily done overtopped the balance claimed by the plaintiff, the plaintiff's claim should be dismissed and judgment given for damages on the counterclaim.

Cases referred to:-

(1) *Hoenig* v. *Isaacs* [1952] 2 All E.R. 176, 181.
(2) *Sumpter* v. *Hedges* [1898] 1 Q.B. 673.
(3) *Appleby* v. *Myers* (1867) L.R. 2 C.P. 651.
(4) *Whitaker* v. *Dunn* (1887) 3 T.L.R. 602.
(5) *Bolton* v. *Mahadeva* [1972] 2 All E.R. 1322.
(6) *Kiely & Sons Ltd.* v. *Medcraft* (1965) 109 Sol. Jo. 829 C.A.
(7) *Hanak* v. *Green* [1958] 2 Q.B. 9.

CIVIL SUIT.

S. Thillaimuthu for the plaintiff.

S. Jeya Palan for the defendants.

Gunn Chit Tuan J.: The plaintiff, K.P. Kunchi Raman, who was a contractor, originally claimed that a sum of $16,580.18, which was later reduced to $11,656.81, was due to him being the balance payable for work performed under an agreement dated the 17th day of November, 1970. By that agreement, the plaintiff agreed to execute certain works, namely, to lay water pipes complete with specials and valves between Mak Mandin and Prai and between Mak Mandin and Jalan Raja Uda in Butterworth. Under the agreement, the defendant undertook to supply the pipes, etc. at the site of work, whereas the plaintiff was to supply all labour and other equipment for laying the pipes. The contract also included work for the reinstatement of a cycle track of a size and length and at rates detailed in the said agreement.

The plaintiff claimed that he had performed the work of reinstatement of the cycle track by July 15, 1971 and the other works by September 15, 1971. The defendant, a company, denied that the plaintiff had completed the works in question as claimed by him, and averred that it was a term of the contract that the plaintiff would execute the works to the satisfaction of the defendant and the Chief Resident Engineer of the River Muda Water Scheme, who was in charge of the contract works, but in spite of repeated requests by the defendant to comply with the instructions, the plaintiff failed to complete the works as agreed.

Because of the plaintiff's failure and refusal to complete the contract work and to carry out repairs in respect of work already completed, the defendant had to engage other sub-contractors to replace the plaintiff after giving him due notice. The defendant had to pay the other sub-contractors appointed in place of the plaintiff a total sum of $22,451.44 to complete the contract work and to carry out the necessary repairs on works which had been unsatisfactorily completed. It claimed that it had suffered a loss of $6,047.54 and therefore counter-claimed for the repayment of a sum of $55,024.23 already paid to the plaintiff or alternatively, damages in the sum of $6,047.54, and costs.

Although the plaintiff commenced work about a week before the date of the said agreement and he agreed to "complete the whole work within four

months of the starting date of the work", yet it was agreed by the parties concerned and shown by the events in this case that time was not of the essence of the contract. The defendant, who was executing the works concerned on behalf of Messrs. Goh Soo Hean Construction Co. Ltd. which had contracted with the State Government of Penang, received the specials, etc. late from the State Jabatan Kerja Raya and was in turn unable to supply them to the plaintiff until about the early part of September 1971. But that did not affect the work of the plaintiff who accepted the situation as such and carried on other works until he left the site also in September 1971 after the arrival of the specials, etc. The plaintiff abandoned his contract work with the defendant and left the site for Kuala Lumpur because he had obtained and started work there for Messrs. Lim Huck Bee Construction Co. in late August/beginning of September 1971.

The issue in this case was whether the said agreement was a divisible or entire contract. On entire and divisible contracts, *Chitty* on Contracts (23rd Ed.) Vol. 1 states as follows in paragraph 1147:

"*Entire and divisible contracts.* In an entire contract, complete performance by one party is a condition precedent to the liability of the other; in such a contract the consideration is usually a lump sum which is payable only upon complete performance by the other party. The opposite of an entire contract is a divisible contract, which is separable into parts, so that different parts of the consideration may be assigned to severable parts of the performance, e.g., an agreement for payment *pro rata*. It is a question of construction of the contract whether it is entire or divisible, but in the reported cases (none of which is of recent date) the courts have tended to the view that in every lump-sum contract there is an implied term that no part of the price is to be recovered without complete performance. In most modern contracts of any size, however, payments by instalments are specified, so that the law on entire contracts is not often relevant to contracts nowadays."

There is also the following paragraph of the meaning of entire contracts in paragraph 1145 of Vol. 4 of *Halsbury's* Laws of England (Fourth Edition): —

"An entire contract is one where the complete performance of one party is a condition precedent to his right to call for the performance of the other party's obligation. Where the contractor undertakes to complete the works and the contract on its true construction is entire, the employer is entitled to insist on completion before his obligation to pay arises. If the building contractor leaves the work unfinished to a substantial degree he cannot claim a corresponding percentage of the contract sum or recover on a quantum meruit basis for that part of the work he has completed; moreover, he will be liable in damages to the employer for breach of contract. Nevertheless, if he can show that he has substantially completed the works (even though some minor items might remain unfinished) he will be entitled to claim payment.

Where a contractor agrees to do the work for a lump sum he cannot recover any part of that sum until the work is complete, unless there is provision in the contract for payment by instalments."

Bearing in mind the above-quoted passages, I proceeded to examine the agreement in question. It is an agreement to execute certain works to the satisfaction of the defendant and the Chief Resident Engineer of the River Muda Water Scheme. In clause (2) it is provided that the defendant "shall pay the (plaintiff) for all work done by the (plaintiff) in accordance with this agreement at the rates and amounts detailed hereinafter amounting to...." In clause (7) it is provided that "for purpose of payment all pipes, specials and valves shall be measured along the centre line of the *finished pipeline inclusive of specials and valves*" (emphasis is mine). In clause (9) of the said agreement it is provided that "on completion of the work the *whole* work shall be measured and any variation (additions or deductions) on the above quantities shall be adjusted according to the respective rate for each item". Finally, in clause (16) it is provided that the defendant "shall make progress payments at regular intervals to the (plaintiff) for all work done by him at the rate of 90% of the value of the work done by the (plaintiff). Such progress payments shall be made within seven days of receipt of progress payments, in respect of the (plaintiff's) part of the work, by the (defendant) from the Penang State Government. The balance of 10% of the value of the work shall be paid to the (plaintiff) within fourteen days of completion of *all work* by the (plaintiff) in accordance with this agreement."

Counsel for the plaintiff did not, nor could he, in my opinion, seriously contend that the said agreement was a divisible contract, whilst counsel for the defendant contended that it was an entire contract. The said agreement would appear to be an entire contract. It is a contract for specified works and the price is to be ascertained and paid in accordance with a schedule of rates. In my view, the said agreement must be construed as a whole and in so doing I found from the above-quoted clauses of the agreement that the parties had expressed a clear intention that the contract should be entire. Generally such contracts will not be entire, but they could be entire if that is the clear intention of the parties. Thus Lord Justice Denning (as he then was) has expressed the following dictum in the case of *Hoenig* v. *Isaacs*[1]: —

"It is, of course, always open to the parties by express words to make entire performance a condition precedent. A familiar instance is when the contract provides for progress payments to be made as the work proceeds, but for retention money to be held until completion. Then entire performance is usually a condition precedent to payment of the retention money, but not, of course, to the progress payments. The contractor is entitled to payment pro rata as the work proceeds, less a deduction for retention money. But he is not entitled to the retention money until the work is entirely finished, without defects or omissions."

In this case, the retention money was only 10% and the contract was for specified works for a specific sum to be ascertained in accordance with a schedule of rates. I therefore found that the said agreement was, on its true construction, an entire contract, and the plaintiff was not relieved of his obligation to complete the contract work for the defendant. On this ground alone, the plaintiff's claim could have been dismissed (cf. *Sumpter* v. *Hedges*[2]).

However, the rigours of the common law rule as shown in the older reported cases such as *Appleby* v. *Myers*[3] and *Whitaker* v. *Dunn*[4] which require complete performance by a promisor as a condition precedent to his right of recovery under an entire contract has been modified by later decisions, and it is now established by the so-called doctrine of substantial performance that a promisor who has substantially performed his side of the contract may sue on the contract for the agreed sum, although he remains liable in damages for his partial failure to fulfil his contractual obligations. The authoritative

statement of the law on this matter can be found in the said judgment of Lord Justice Denning (as he then was) in the above-quoted case of *Hoenig* v. *Isaacs* where His Lordship said thus: —

"... the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or alternatively, set them up in diminution of the price. The measure is the amount which the work is worth less by reason of the defects and omissions, and is usually calculated by the cost of making them good."

I have, as stated above, come to the conclusion that the said agreement was an entire contract, but as the doctrine of substantial performance has not been excluded by an express provision in the said agreement it would also be necessary to examine whether the plaintiff had substantially performed his contract. Counsel for the defendant referred to the case of *Bolton* v. *Mahadeva*[5] in which the English Court of Appeal has indicated that where a contract has been substantially performed, the test was substantial performance and not whether the defects were of such a trifling nature that they could be disregarded under the *de minimis* rule and in considering whether there had been substantial performance it was relevant to take into account both the nature of the defects and the proportion between the cost of rectifying them and the contract price. In that case the plaintiff agreed with the defendant to install central heating and to perform certain other work in the defendant's house. The contract price for the central heating installation was a lump sum of £560. On completion of the work the defendant complained that the work was defective and refused to pay. At the trial of an action by the plaintiff for the price the judge found that because of a defective flue there were fumes which affected the condition of the air in the living rooms and that the amount of heat given out was such that the house was on the average 10 per cent less warm than it should have been with the heating system. The judge held that because of those and other deficiencies the defendant was entitled to set off £174.50 against the contract price. He gave judgment for the plaintiff for the balance accordingly. The defendant appealed and the English Court of Appeal held that the plaintiff was not entitled to recover and allowed the appeal after applying the above-quoted test and because it considered that it was impossible in the circumstances of that case to say that the contract had been substantially performed by the plaintiff.

In the present case, counsel for the defendant pointed out that the plaintiff would have been entitled to total payment of about $71,000, after necessary adjustments, and it cost the defendant about $22,000 to complete the contract work and carry out the necessary repairs to work unsatisfactorily done. He argued that as in the case of *Bolton* v. *Mahadeva* where the cost of repair to defects in workmanship amounted to between one-third and one-quarter of the contract price, the extra cost to the defendant in this case of nearly a third of the contract price showed that the plaintiff had not substantially performed his contract. Counsel for the plaintiff contended that the court must consider both the nature of the defects and the proportion between the cost of rectifying them and the contract price. However, apart from the test laid down in the case of *Bolton* v. *Mahadeva*, it is clear from the judgment of Willmer L.J. in the English Court of Appeal case of *Kiely & Sons, Ltd.* v. *Medcraft*[6] that substantial performance is not to be measured by strict financial calculation. Lord Justice Salmon in that case agreed with Lord Justice Willmer and said that it was for the court to consider the defects and see whether the work was substantially completed. It was a question of fact and degree in every case.

In this case, the contract was essentially for a finished pipeline inclusive of specials and valves. After laying most of the pipes the plaintiff abandoned the contract work without fixing the specials, etc. which arrived in September 1971. Although the cost to the defendant of completing the contract work and to carry out necessary repairs was over $22,000, yet the work left undone was according to paragraph 2 of the plaintiff's reply only about $4,000. He had already completed the greater part of the contract work and had been paid over $55,000 out of a sum of about $71,000. In fact after certain adjustments the balance due to him was only about $11,000. It is true that there was also work unsatisfactorily done as detailed in the letters at pages 18 and 19 of the Agreed Bundle of Documents (Exhibit "A") but considering the nature of the defects, the cost of rectifying them and the balance of work left undone, I was inclined to the view and found that in all the circumstances of this case the plaintiff had substantially completed the contract. For that reason I held that the defendant was not entitled to repayment of the said sum of $55,024.23 paid to the plaintiff who was entitled to claim for any balance due to him for work done. But the defendant was also, in the words of Lord Justice Denning in the above-quoted case of *Hoenig* v. *Isaacs*, entitled to "cross-claim for the defects and omissions" and damages awarded will, if less than the balance due, go in diminution of the said balance claimed by the plaintiff. As regards the measure of damages in cases of defective or incomplete work, I would refer to the following passage in *Hudson's* Building and Engineering Contracts (10th Ed.) at page 585: —

"In those cases where, in breach of contract, the work has been left incomplete, whether by abandonment, termination, or otherwise, or containing defects, the direct measure of damage will be the difference between the reasonable cost to the employer of repairing the defects or completing the work, together with any sums paid by or due from him under the contract, and the sums which would have been payable by him under the contract if it had been properly carried out."

According to counsel's calculations, the loss suffered by the defendant was, as originally claimed $6,086.42, but after a slight adjustment, $6,047.54. Adopting the method suggested in the above-quoted passage for assessing damages in this case, I also arrived at the figure of $6,086.42, which subject to the adjustment, was $6,047.54. I therefore dismissed the plaintiff's claim with costs and allowed the defendant's alternative counter-claim for damages for the said sum of $6,047.54 together with half his taxed costs.

On the question of costs, I would again refer to the following paragraph in *Hudson's* Building and Engineering Contracts (10th Ed.) at page 584:—

"... the legal nature of the employer's right to damages against a building contractor where the latter sues for the price of the work was until recently somewhat obscure. It is now clear that it operates as a defence to the claim (technically, as an equitable set-off), which may have an important bearing on costs, since, if it exceeds the amount claimed, the claim will be treated as having failed."

The cost of completing the contract work and repairing work unsatisfactorily done in this case overtopped the balance claimed as due and payable for work performed by the plaintiff under the said agreement. There was perhaps no need for me to have made a specific order dismissing the plaintiff's claim with costs because the said claim would have been treated as having failed. In other words, the defendant had succeeded in defeating the claim of the plaintiff and in establishing its right to $6,047.54 on the counter claim. On that basis the fair order to make as to costs should probably have been somewhat similar to that made in the case of *Hanak* v. *Green*.[7] In that case, the plaintiff bought a house from the defendant, a builder, and contracted with him that he would do specified alterations to it by the date fixed for completion of the purchase. Subsequently she complained that the work had not been completed in time and that some of it was not satisfactory. In proceedings in the county court the plaintiff claimed £266 14s., whilst in his defence the defendant said he would "if necessary seek to set up (his counterclaim) by way of set-off in extinction or ... in diminution of the plaintiff's claim". The county court judge, revising the report of a referee to whom the respective claims had first been submitted, awarded the plaintiff £74 17s. 6d. and the defendant £84 19s. 3d. and ordered the plaintiff to pay the balance of £10 1s. 9d. to the defendant. He further gave the plaintiff the costs on her claim and the defendant his costs on the counterclaim.

The defendant appealed, contending that his counterclaim should be treated as being a set-off and, therefore, the plaintiff should recover nothing, and he (the defendant) should recover £10 1s. 9d. and be awarded the costs of the proceedings. The English Court of Appeal held *inter alia* that the defendant had an equitable set-off which defeated the plaintiff's claim; there would, therefore, be judgment for the defendant on the claim and judgment for him on the counterclaim for the balance. It also held that on that basis the fair order to make as to costs was that there should be judgment for the defendant on the claim with costs and that there should be judgment for the defendant for £10 1s. 9d. on the counterclaim with costs.

In this case, therefore, the judgment should have been specifically for the defendant on the plaintiff's claim with costs and judgment for the defendant for $6,042.54 on the counter-claim with half costs. In the result the plaintiff would still have to, as ordered, pay the defendant, the said sum of $6,047.54, costs of the claim and half the costs of the counter-claim.

Order accordingly.

Solicitors: *Thillaimuthu & Phock Kin; Maxwell, Kenion, Cowdy & Jones.*

KULUWANTE (AN INFANT) v. GOVERNMENT OF MALAYSIA & ANOR.

[O.C.J. (Yusoff J.) May 13, 1977]

[Kuching — Civil Suit No. K.242 of 1976]

Practice and Procedure — Declaratory suit — Alternative remedy — Locus standi — Ouster provision — R.S.C. 1967, O. 25, s. 16 — Federal Constitution, Article 15(2).

In this case the plaintiff had applied for declarations — (i) that the decision of the Registrar of Citizens Malaysia in rejecting the application of the plaintiff as a citizen is invalid; (ii) that the reasons given by the Registrar of Citizens for rejecting the plaintiff's application are bad in law and inconsistent with the provisions of Article 15(2) of the Constitution of Malaysia and (iii) that the plaintiff is eligible for registration as a citizen of Malaysia under Article 15(2) or Article 15A of the Constitution of Malaysia. The defendants made preliminary objections to the proceedings by the plaintiff on three grounds:

(1) that the decision of the government is final;

(2) that the applicant has not exhausted her statutory remedies; and

(3) that the form of application before the court is not proper.

Held: (1) the court in exercise of its inherent supervisory jurisdiction has the general power to award declaratory judgments in order to ensure that statutory tribunals whether judicial or administrative made their determination in accordance with the law. This remedy is available in any case where a statutory tribunal has acted without or in excess of jurisdiction or in breach of the rules of natural justice. The remedy is not excluded by the fact that any determination is by statute made final;

(2) the court has jurisdiction to entertain an action for declaration to correct an error of law in the proceedings before a tribunal and to declare such proceedings invalid or a nullity, and such jurisdiction cannot be excluded or taken away from the subjects except by clear words;

(3) in an action for a declaratory judgment, the plaintiff has to establish her title to sue. She has to establish that she has an immediate personal interest in the subject-matter of the proceedings and in claiming a declaration which relates to legal right, all that she has to establish is that she has some legitimate expectation of such right or interest;

(4) in a proper case the court is not precluded by reason of the 'ouster provision' only, to entertain a claim for a declaration that an individual is a citizen but whether the court would entertain a claim for a declaration that the plaintiff is eligible for registration as a citizen under a relevant provision of the Federal Constitution, as it was sought in this case, involves different consideration and the court should also construe other provisions of the law relating to citizenship to determine the effect of such declaration;

(5) as in this case the plaintiff had not exhausted the alternative remedy of an appeal to the Minister, the claim for the declarations should be dismissed.